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No. 94-692

In The

# Supreme Court of the United States

October Term, 1994

ERIC ANTONIO PARKER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent,*

**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Respondent's arguments and choice of precedent illustrate why this Court should consider Petitioner's issues. As indicated by examination of the Petition and Brief in Opposition, there are any number of authorities supporting both Petitioner's position on these issues and Respondent's position. The conflicting authority is precisely the reason why review by this Court is crucial.

I. This Court Should Grant The Petition to Resolve The Conflict Between The Circuits Regarding Whether The Government Should Be Allowed To Present

Evidence Of Uncharged Misconduct To Prove Intent When The Defendant Generally Denies The Charge So That Intent Is Not A Disputed Issue At Trial.

Early in Respondent's Brief, the assertion is made that other acts evidence was admitted in the Parker trial to show Petitioner's *modus operandi* and intent. Though this issue was never fully argued at trial, it should be noted that for 404(b) evidence to be admitted for this purpose, the government must show some unusual signature trait to identify the defendant as the perpetrator of both the charged crime and the uncharged crimes. *United States v. Jones*, 28 F.3d 1574, 1580 (11th Cir. 1994). This insures that "the government is not relying on an inference based on mere character -- that a defendant has a propensity for criminal behavior." *Id.* Trafficking drugs by airplane, paying others, even women, to transport drugs, and distributing drugs from hotel rooms do not constitute signature traits.

Further, Respondent's reliance on this Court's opinion in *Estelle v. McGuire*, 112 S. Ct. 475 (1991) for the proposition that evidence of intent is always admissible in specific intent crimes, regardless of the defense chosen, is flawed. The holding in *McGuire* did not concern 404(b) evidence; the issue there was a special branch of California law which specifically allowed for the admissibility of prior injury evidence in child abuse cases in order to prove battered child syndrome. Obviously, California deemed child abuse a heinous evil which merited specific protections in the law for victims. No such protections have been put in place

to guard against drug crimes.

Any quote taken from *McGuire* to support Respondent's assertion that the government should be allowed to admit evidence of intent regardless of the defense used, is taken out of context. That case addressed the narrow issue of prior injury evidence in murder prosecutions involving battered child syndrome. Obviously, that is not the instant situation.

Respondent further asserts that

> Petitioner errs in suggesting that review is warranted in this case to resolve a claimed circuit conflict on the circumstances in which a general denial puts intent in issue, thus rendering other acts evidence admissible. Petitioner identifies no circuit that holds that, in a specific intent crime such as this one, a general denial, standing alone, does not put intent in issue.

(Res. 7, n. 4)[1]

On the contrary, Petitioner specifically states in his Petition, "[T]he Second Circuit is the only Court of Appeal to hold that a general denial negates intent as an issue in all cases, even those involving specific intent crimes. Petitioner

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[1] Denotes Respondent's Brief in Opposition, page 7, footnote 4.

further cites six cases that have stated this holding, or have stated the principle as a general rule of law. Specifically, in *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988), where the defendant was charged with possession of heroin with intent to distribute, the Court of Appeals for the Second Circuit stated, "[I]ntent is not placed in issue by a defense that the defendant did not do the act at all." *Id.* at 904. Further, "[w]hen a defendant unequivocally relies on such a defense, evidence of other acts is not admissible for the purpose of proving intent. *Id.* In support of this principle, the *Ortiz* court cites a case even more similar to the case at hand: *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980). In *Figueroa*, the defendant was charged with conspiracy to possess and distribute heroin, as well as possession of heroin with intent to distribute. The Second Circuit held that "[i]t was error to admit [the defendant's] prior conviction" where defense counsel "made clear that his defense was denial that the alleged conduct of his client had occurred at all." *Id.* at 940.

## II. This Court Should Grant The Petition To Resolve The Conflict Between The Circuits Regarding Whether An Unequivocal Offer of Stipulation Or Concession Serves To Remove Intent As An Issue At Trial, Such That The Government Should Be Prohibited From Presenting Evidence On That Issue

Respondent effectively concedes that, given a proper stipulation to remove an issue from consideration, a court should preclude other act evidence on that issue. (Res. 7-8)

However, Respondent claims that Petitioner's proffered stipulation does not succeed in removing the issue from consideration. Respondent does not even address the fact that Petitioner's stipulation essentially mirrors the language which the Eleventh Circuit in *United States v. Cardenas*, 895 F. 2d 1338 (11th Cir. 1990), implied would be a proper stipulation. There, the court found no adequate stipulation since "[t]here [was] no indication in the record that the defendant would have conceded his intent to participate in the [charged] transaction if the government proved that he was involved." *Id.* at 1342.[2] The Eleventh Circuit is obviously implying that an adequate stipulation would be one that admits the mental state should the acts be proven. That is precisely what Petitioner offered in the instant case.

In addition, Respondent appears to misunderstand the intention of Petitioner's stipulation. Petitioner offered to stipulate that "if the jury finds beyond a reasonable doubt that Katrina Lymon received the cocaine in issue from Eric Parker, and if Eric Parker paid Katrina Lymon to fly it to Tallahassee, then that would establish intent to deliver." Pet. 15. From reading Respondent's Brief in Opposition, it is clear that Respondent interpreted this to mean that the prosecution would have to prove that Parker *paid Lymon to transport the drugs*. However, what the prosecution actually

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[2] Respondent dismisses Petitioner's third issue similarly, by claiming that since there was no proper stipulation, no 403 balancing is necessary. (Resp. 9, n. 5). Petitioner argues that the stipulation removed the issue of intent from consideration, thus making the prejudicial effect of the evidence far outweigh its probative value.

needed to prove was simply that *Parker* was the one who did those acts. Obviously, Lymon received the drugs from someone who directed her to transport them somewhere. Petitioner's defense was simply that he was not that person. This interpretation is supported by the fact that initially Lymon claimed that a man named "Jimbo" was the responsible party. Pet. 4. Petitioner simply offered to concede intent if the prosecution could prove that Parker was the man responsible for Lymon's actions.

This case is nothing like the dilemma faced by the Eleventh Circuit in *United States v. Dynalectric*, 859 F. 2d 1559 (11th Cir. 1988), which Respondent cites to support his contention. There, the defendant was accused of conspiring to violate anti-trust laws. The defense, in order to preclude 404(b) evidence of intent, offered to stipulate that "[i]f the jury finds that the defendants met and agreed to fix bids as alleged, intent to restrain trade shall be presumed." *Id.* at 1581. Obviously, the prosecution would have already proven intent if they managed to prove that the defendants met and agreed to fix bids. But that is not the case here; all Petitioner asked was that the prosecution prove that *he was the one* who committed the crimes charged. In Dynalectric, it was possible that no bids were fixed, that no one conspired to do anything, and that no crime was committed. Conversely, it is obvious that the crimes with which Petitioner was charged were committed by someone; that was not the issue. The issue was whether Petitioner was the right person; that is all the prosecution had to prove.

In any case, nothing Respondent stated in its brief diminishes the fact that the different circuits are not handling this issue in the same way. There is a definite need for Supreme Court guidance here.

## III. This Court Should Resolve The Split In The United States Court Of Appeals And Determine Whether The Amount Of 404(b) Evidence Admitted Weighs Upon The Rule 403 Analysis

Respondents' tally of uncharged act witnesses is conservative and deceiving. The government states that just six of the fifteen witnesses at Petitioner's trial testified to extrinsic act evidence. The government's calculations are questionable since nowhere is there a list of the witnesses the government includes in this calculation. Petitioner, on the other hand, listed seven witnesses specifically on pages 6 to 7 of his Petition. Presumably, the government does not include John Clark, the South Carolina narcotics investigator who testified that he knew Petitioner by the nickname "E". However, any discussion of prejudice stemming from uncharged act evidence must include Mr. Clark's testimony. Mr. Clark took the stand immediately after Shirelle Merit, who testified of her drug dealings with Petitioner in South Carolina. Clark testified that he was employed as a South Carolina narcotics investigator, and that he knew of Eric Parker. Clark then identified Petitioner as Eric Parker, and further stated that he had occasion to come into contact with Parker in Charleston in September of 1988. Parker then told

Clark that he was known by the nickname "Easy E".

Clark may not have said that he was involved in a drug related incident with Parker in South Carolina in 1988, but the jury heard exactly that. They did not think that Parker had dinner with Clark in Charleston in 1988, nor did they think the two went golfing. In the mind of a juror preparing to decide whether a man is guilty of drug crimes, the fact that a South Carolina narcotics investigator saw Eric Parker in 1988 means that Parker was arrested or at least investigated for drug crimes in 1988 in Charleston. Maybe this evidence is not technically 404(b) evidence, but that fact does nothing to lessen the force of Petitioner's argument. The jury in the Parker trial was bombarded with evidence that Eric Parker was a man with a record. He was a man who had been investigated for drug crimes in many states. He was a criminal. Clark's testimony contributed to these characterizations, and as such, should be included in any discussion of prejudicial testimony in Petitioner's trial.

Respondent may also have excluded Shirelle Merit's testimony when counting the number of other acts witnesses. However, as noted in our brief, Merit did testify about uncharged acts in South Carolina, and the trial judge was unclear in his ruling on the admissibility of her testimony. Further, Respondent specifically states in its Brief in Opposition, "Merit's testimony was properly admitted under Rule 404(b) as evidence of petitioner's intent and *modus operandi*." Res. 11.

In addition, of the fifteen witnesses in the trial, three

witnesses testified to technical aspects of the trial and did not incriminate Parker in any way. Thus, even using Respondent's conservative figure of six 404(b) witnesses, only six witnesses actually implicated Petitioner in the crime charged. The prejudicial effect of the uncharged act evidence was overwhelming, and far outweighed its probative value.

Respondent argues that since the testimony of the extrinsic act witnesses covered "just 35 pages of the trial transcript," it was not a feature of the trial. Even conceding Respondent's characterization of which witnesses offered uncharged act evidence, thirty five pages of a trial transcript were devoted solely to the examination of witnesses who offered no information other than past wrongs of Petitioner is excessive. Petitioner was accused of conspiracy to traffic cocaine and possession of cocaine with intent to distribute. He was tried for that crime. He was not being tried for prior acts in Houston, or South Carolina, or Memphis. Yet testimony on these incidents filled thirty-five pages of the trial transcript in Florida. This evidence, which is regarded by all who comment upon it as highly prejudicial due to jurors' tendency to afford it undeserved weight,[3] was presented through at least six (6) witnesses, and filled at least thirty-five (35) pages of the trial transcript, but the government does not think that other acts were a feature of the trial. If not, then when does this evidence become excessive? Must it take up half the trial transcript or be presented through half of the government's witnesses? Or

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[3] See *Michelson v. United States*, 335 U.S. 469, 476 (1948).

should seventy-five percent be the threshold?

"Feature" does not necessarily mean "majority". Evidence that is already regarded as highly prejudicial does not need to encompass over half of a trial before it becomes more prejudicial than probative. It is enough to say that the extrinsic acts were highly emphasized. Whatever the threshold is, the government exceeded it in this case. Thirty-five pages and six of fifteen witnesses should be enough to tip the scales to make this inherently prejudicial evidence more prejudicial than probative.

The fact remains that the circuits are not in agreement on this issue, and that this Court's guidance is necessary to right the wrong of Petitioner's having been tried using vast amounts of evidence of crimes for which Petitioner was not on trial.

## CONCLUSION

For the foregoing reasons, as well as the reasons stated in Petitioner's original Petition, this Petition for Certiorari should be granted.

Respectfully submitted,

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